

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JESUS RAFAEL VIRRUETA,
Petitioner.

No. 2 CA-CR 2018-0235-PR
Filed November 26, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20135033005
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Joshua Mosher, Assistant Attorney General, Tucson
Counsel for Respondent

Law Offices of Erin E. Duffy P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Petitioner

STATE v. VIRRUETA
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Eppich and Chief Judge Eckerstrom concurred.

VÁ S Q U E Z, Presiding Judge:

¶1 Petitioner Jesus Virrueta seeks review of the portion of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We review a court's denial of post-conviction relief for an abuse of discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find no such abuse here.

¶2 Following a jury trial, Virrueta was convicted of one count of conspiracy, one count of conducting an illegal enterprise, two counts of selling a dangerous drug, and two counts of selling a narcotic drug. After finding Virrueta had three historical prior felony convictions, the trial court sentenced him to enhanced, concurrent, presumptive prison terms, the longest of which is 15.75 years. Virrueta appealed and his attorney filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999); Virrueta did not file a supplemental brief. We affirmed Virrueta's convictions and sentences as corrected.¹ *State v. Virrueta*, No. 2 CA-CR 2015-0401 (Ariz. App. June 27, 2016) (mem. decision).

¶3 Virrueta then sought post-conviction relief, asserting he should not be required to serve flat-time prison terms on two of the counts, arguing that the trial court erred in failing to cite to A.R.S. § 13-3407(F) to ensure he would be eligible for release after serving 85 percent of his sentences on those counts. He alternatively contended that trial counsel was ineffective for failing to inform him he might receive a flat-time sentence if he were to be convicted of the offenses after a trial, maintaining he would have accepted the state's plea offer if counsel had told him this. The court summarily denied relief on the first claim, but conducted an evidentiary hearing limited to the ineffective assistance claim, dismissing the petition after the hearing. This petition for review followed.

¹We corrected a clerical error in the trial court's minute entry. *State v. Virrueta*, No. 2 CA-CR 2015-0401, ¶ 4 (Ariz. App. June 27, 2016) (mem. decision).

STATE v. VIRRUETA
Decision of the Court

¶4 In its ruling summarily denying Virrueta’s sentencing claim, the trial court relied on the reasoning set forth in our unpublished decision in *State v. Ochoa*, No. 2 CA-CR 2015-0190 (Ariz. App. Apr. 20, 2016) (mem. decision).² On review, Virrueta solely challenges the court’s summary denial of his sentencing claim, expressly stating he “is not seeking review of the trial court’s ruling regarding the ineffective assistance of counsel claim.”

¶5 We will affirm a trial court’s decision in post-conviction relief proceedings if it is legally correct for any reason. *Roseberry*, 237 Ariz. 507, ¶ 7. Although the trial court addressed the sentencing claim on the merits, that claim, which was separate from his alternate claim of ineffective assistance of trial counsel, was precluded because it could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3), (c). And Virrueta does not maintain his claim falls within any of the exceptions to preclusion set forth in Rule 32.1(d) through (h).

¶6 Accordingly, although we grant review, we deny relief.

²Division One of this court recently issued a published opinion adopting our reasoning in *Ochoa*. *State v. Scalp*, 245 Ariz. 177, ¶¶ 13-14 (App. 2018).